

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Modesto, CA)

THE PEPSI BOTTLING GROUP, INC.

Employer¹

and

Case 32-RC-5276

TEAMSTERS UNION LOCAL 386,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO²

Petitioner

DECISION AND DIRECTION OF ELECTION

The Pepsi Bottling Group, Inc., herein called the Employer, is in the business of manufacturing, merchandising and distributing soft drink products and other beverages. The Employer warehouses and distributes soft drink products from the facility at issue, located at 200 West River Road, Modesto, CA 95351 (“the Modesto facility”). Teamsters Union Local 386, International Brotherhood of Teamsters, AFL-CIO, herein called the Petitioner or the Union, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time Conventional Customer Representatives (also known as “Conventional CRs,” “route salesmen” or “route salespersons”), Full Service Customer Representatives, Fountain Customer Representatives, Bulk Drivers (also known as “bulk delivery drivers”), Utility Relief Drivers (also known as “relief customer representatives”), Fleet Mechanics, Lead Fleet Mechanics/forepersons, Warehouse Employees and Lead Warehouse Employees employed by the Employer at the

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

Modesto facility; excluding all other employees, Pre-Sale/Pre-Sell Representatives, Merchandisers, Reset Labor Employees, Marketing Equipment Management (MEM) employees, Lead Service Technicians, Checkers, clerical employees, guards, and supervisors as defined by the Act. A hearing officer of the Board held a hearing, and the Petitioner and Employer each filed a brief with me, which I have duly considered.

The primary issue here is whether the unit sought by the Petitioner, as amended at hearing, is appropriate for collective bargaining, or whether, as the Employer contends, the unit is appropriate only if four additional classifications are added to the unit. Specifically, the parties agree that some community of interest exists among the classifications the Petitioner seeks, i.e., Conventional Customer Representatives, Full Service Customer Representatives, Fountain Customer Representatives, Bulk Drivers, Utility Relief Drivers, Fleet Mechanics, Lead Fleet Mechanics/forepersons, Warehouse Employees and Lead Warehouse Employees. However, the Employer asserts that Petitioner's proposed unit is appropriate only if the classifications Merchandiser, Reset Labor Employee, Marketing Equipment Management (MEM) employee, and Lead Service Technician are also included.³

For the reasons noted below, I find that the petitioned-for unit is not an appropriate unit. Instead, I find that the Merchandisers, Reset Labor Employees, MEM employees and Lead

³ The parties stipulated to the appropriateness of excluding the category Pre-Sale/Pre-Sell Representative from the unit. Although, as explained below, Pre-Sale/Pre-Sell Representatives make up part of the team (along with Bulk Drivers and Merchandisers) which cumulatively services large format accounts (e.g., Wal-Mart, Costco), and although it would be inappropriate to exclude the Pre-Sale/Pre-Sell Representatives solely on the basis of the parties' agreement to exclude them (Cruise Along Boats, Inc., 128 NLRB 1019, 1020 (1960)), I concur in the parties' mutual decision to exclude the Pre-Sale/Pre-Sell Representatives in light of the record evidence showing differences in the work performed by the Pre-Sale/Pre-Sell Representatives and that performed by the other classifications. Thus, unlike the driver classifications, there is no evidence that Pre-Sale/Pre-Sell Representatives ever deliver any beverages or other products to any facilities. Unlike warehouse personnel, there is no evidence that Pre-Sale/Pre-Sell Representatives ever load beverages or equipment on trucks. Unlike Fleet Mechanics, Service Technicians and Shop Technicians, there is no evidence that Pre-Sale/Pre-Sell Representatives ever repair or maintain vehicles, coolers, fountain machines or vending machines.

Service Technicians share a sufficient community of interest with the petitioned-for employees to require their inclusion in any unit of the latter.

OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer's Modesto facility is engaged in the warehousing, sale, and distribution of soft drinks and other beverages. From this facility, the Employer installs, stocks, maintains, and services vending machines, coolers, and fountain equipment to supermarkets and various retail and commercial outlets. The Employer is not engaged in the manufacture and bottling of products at its Modesto facility. Its customers consist of "large format" customers, such as mass merchandisers (e.g., Target, Wal-Mart, Sam's Club, and Costco); "small format" customers, such as convenience stores, gas stations, drug stores, and independent businesses; and "food service" customers, such as restaurants, bars, schools and universities, hospitals, and video stores. Modesto's specific market is defined as the "San Joaquin Valley" market unit, which is a subdivision of the Employer's "Pacific Northwest Business Unit".

The highest-ranking member of management at the Modesto facility is its Regional Sales Manager, Marla Meyer. As Regional Sales Manager, Meyer supervises and receives the direct reports of two Territory Sales Managers and a Sales and Delivery (S&D) Operations Manager. Meyer also has indirect reporting relationships with an Administrative Supervisor and a Marketing Equipment Management supervisor. Meyer and a Human Resources Manager determine the appropriate levels of employee compensation.

The Modesto facility is comprised of at least three buildings. There is a "back operations building" where the Employer stores vending machines, coolers, and similar equipment, and where the Product Availability Manager, Inventory Clerk, Food Service Representatives, Sales Representatives, and Marketing Equipment Management (MEM) employees perform their work.

Approximately 75 yards away is a warehouse, where trucks are loaded with product and where Warehouse Employees and Lead Warehouse Employees perform their work. Finally, there is a separate building in which all repair and maintenance of vehicles is performed by Fleet Mechanics and Lead Fleet Mechanics. The Employer employs in excess of 144 employees at the Modesto facility.

All full time employees working out of the Modesto facility receive the same fringe benefits, are subject to the same employee handbook policies and employee trainings and orientations, have the same vacation policy, wear similar uniforms, and attend the same Employer-sponsored social functions. All employees working out of the Modesto facility serve or are eligible to serve on various workplace committees, such as the Accident Review Board, Safety Empowerment Team, and Employee Insight Action Committee, and are eligible to receive the same safety, attendance and/or employee referral bonuses.

THE POSITION OF THE PARTIES

The Petitioner seeks to represent a traditionally appropriate drivers unit, but with the addition of warehouse employees, fleet mechanics, and lead fleet mechanics. The parties agree at minimum that some threshold community of interest is shared among the classifications included in the petitioned-for unit. The Petitioner claims that the petitioned-for unit is *an* appropriate unit, and that the Board thus need not consider any alternative unit(s) suggested by the Employer. The Employer asserts that the petitioned-for unit is both arbitrary and artificial, and that the petitioned-for employees do not possess a distinct community of interest separate from certain employees the Petitioner seeks to exclude (Merchandisers, Reset Labor Employees, MEM employees, Lead Service Technicians). As set forth in greater detail below, I conclude

that the Petitioner's requested unit is not appropriate and that the minimally appropriate unit is that proposed by the Employer.

Classifications Undisputedly Included in the Unit

The parties agree that the following classifications of employees are appropriately included in the unit.

Conventional Customer Representatives

The Conventional Customer Representative classification is more commonly referred to in the record as the "Conventional CR." The Employer currently employs approximately 23 Conventional CRs who drive multi-bay (compartment) side-loading tractor-trailers, and possess a commercial (Class A) California driver's license. The Conventional CR is primarily responsible for selling, delivering and merchandising products to smaller customers. Their duties include replenishing and rotating beverages (placing the newest beverage in the back of the rack or shelf and the older beverage in the front of the rack or shelf) at the customer's premises, removing expired product, assessing the placement of promotional materials, building and replenishing displays, and generally placing the Employer's product at points of distribution according to company standards. The Conventional CR primarily services convenience stores, drug stores, smaller grocery stores, and gas stations on an established regular route. The Conventional CR does not service large supermarkets or "big box" stores such as Wal-Mart or Costco. The Conventional CR is paid a base salary plus a commission. Conventional CRs do not receive overtime pay.

Conventional CRs are supervised by two Territory Sales Managers. The Employer provides the Conventional CRs with pagers which they use in the performance of their work. The Conventional CRs also utilize handheld computers while visiting customers, for purposes of

preparing invoices and registering future orders.⁴ Conventional CRs begin work between 4:00 a.m. and 7:30 a.m., with quitting times ranging from 2:00 p.m. to an unspecified time at which all assigned tasks are completed. Conventional CRs ordinarily work Monday through Friday. Conventional CRs must visit the Modesto facility to retrieve their assignments and vehicles loaded with the Employer's products, but spend 15% or less of their work time actually at the Modesto facility. Typically, the Conventional CRs vehicles will have been already loaded with product by warehouse personnel based on orders already inputted into handheld computers by Conventional CRs at an earlier time. The Conventional CRs will pick up and put into the trucks "point of purchase" material, such as promotional advertising displays or pricing tags, if necessary.

Full Service Customer Representatives

The Employer employs seven Full Service Customer Representatives sometimes referred to as "Full Service CRs." The Full Service CRs are supervised by one Territory Sales Manager. The Employer provides the Full Service CRs with Nextel phones and handheld computers for their usage while working. Full Service CRs begin work between 4:00 a.m. and 8:00 a.m., with a quitting time of 1:00 p.m. Full Service CRs ordinarily work Monday through Friday. The Full Service CRs are paid on an hourly basis. Unlike the Conventional CRs, the Full Service CRs receive overtime pay. Full Service CRs drive trucks with bays on them and deliver product largely to vending machines, and also retrieve money from vending machines. They rotate product in such vending machines, if necessary, and ensure that the vending machines meet the Employer's "brand flow" standards.

⁴ The Employer's written job descriptions in the record reflects that a pre-employment physical capability evaluation may be required of persons seeking to be Conventional CRs or Merchandisers, but there is no evidence in the record as to whether such evaluations are routinely conducted or as to whether they are required of the other classifications sought to be included or excluded in this case.

Full Service CRs, like Conventional CRs, have little contact with warehouse employees. They will contact the warehouse supervisor to complain if their truck is loaded improperly. The only time the drivers interact with a warehouse person is when a Warehouse Employee is called in the morning to re-load an improperly loaded truck or bring needed product from the warehouse. Full Service CRs contact with mechanics is similar to that of all of the drivers. In essence, the only contact with mechanics is when, during a pre-trip inspection, they discover a mechanical defect on their truck that can be quickly fixed by the mechanic. The record does not reflect how frequently such mechanical problems occur. As with drivers in other classifications, there is little and infrequent interaction between the Full Service CRs and the other employees in the excluded classifications, such as Merchandisers, Reset Labor Employees, MEM employees, and Lead Service Technicians. However, there is some interaction between Full Service CRs and MEM employees on the occasions that vending machines are to be installed or removed.

Fountain Customer Representatives

The Employer employs five Fountain Customer Representatives, sometimes referred to as “Fountain CRs” at the Modesto facility. The Fountain CRs are paid a base rate and commissions. Unlike all other classifications, Fountain CRs receive variable rate overtime. The Fountain CRs are supervised by a Sales and Delivery (S&D) Operations Manager. The Fountain CRs utilize handheld computers while visiting customers, for purposes of preparing invoices and registering future orders. Fountain CRs begin work between 4:00 a.m. and 6:00 a.m. with a quitting time of 2:00 p.m. Fountain CRs ordinarily work Monday through Friday.

Fountain CRs primarily service restaurants and bars, delivering syrups and other “bag in the box” materials for use in fountain machines, though they occasionally deliver bottled or canned products as well. Fountain CRs utilize, and are responsible for the placement of, the

same types of point of sale materials handled by Conventional CRs. Fountain CRs coordinate their activities with MEM employees on those occasions where the MEM employees install fountain equipment which the Fountain CR then fills for usage.

Bulk Drivers

The Employer employs approximately three to six Bulk Drivers, sometimes known as Bulk Delivery Drivers, who operate 18-wheel semi-tractor-trailers.⁵ The most conspicuous differences between the Bulk Drivers and the Conventional CRs or Full Service CRs are the size of the truck driven and the volume of product. Conventional CRs or Full Service CRs drive smaller trucks and deliver beverage by the case. Necessarily, they stock and shelve the beverages at the stores. Bulk Drivers, on the other hand, drive large tractor-trailers and deliver product by the pallet. Unlike the Conventional CRs and Full Service CRs, who use hand carts to service customers with product from their smaller trucks, Bulk Drivers unload beverages from their tractor/trailers with pallet jacks or forklifts.

The Bulk Driver is part of a three-person team that services the Employer's larger format "big box" customers. In addition to the Bulk Driver, the team is comprised of a Pre-Sale/Pre-Sell Representative and a Merchandiser. In essence, the Pre-Sale/Pre-Sell Representative sells and orders the product, the Bulk Driver delivers it, and the Merchandiser displays it. The Bulk Drivers are hourly paid, receive no commission, but are paid overtime. Bulk Drivers make from \$16-\$18 per hour. The Bulk Drivers are supervised by the Sales and Delivery (S&D) Operations Manager. The Bulk Drivers utilize Employer-supplied handheld computers for performance of their work. Bulk Drivers begin work between 2:30 a.m. and 5:30 a.m., with a quitting time of

⁵ The Employer submitted that there were three or six Bulk Drivers at various places in the record, and asserted that there were three Bulk Drivers in its post-hearing brief.

1:00 p.m. Bulk Drivers ordinarily work Monday through Saturday.⁶ Bulk Drivers are required to maintain their Class A commercial driver's license.

The tractor-trailers of the Bulk Drivers are typically loaded by warehouse personnel in the late afternoon or early evening. Starting work as early as 2:30 a.m., the Bulk Drivers get their trucks out on the road in the middle of the night so as to avoid traffic and minimize disruptions to other activity at the bulk sale clients' facilities.⁷ The Bulk Drivers drop off product and pick up previously removed out of date product and "shells" (e.g., containers for 20 ounce bottles) but do not arrange the product or place it in a location accessible to the public. The product delivered by the Bulk Driver is subsequently arranged and displayed by a Merchandiser.⁸

Utility Relief Drivers

The Employer employs eight to ten Utility Relief Drivers, sometimes referred to as "Utility Customer Representatives" or "Utility CRs", who all possess commercial driver's licenses.⁹ They wear uniforms, are paid on an hourly basis, and receive no commission. The Utility Relief Drivers are supervised by a Territory Coordinator, who reports to one of the same Territory Sales Managers who supervises the Conventional CRs. The Utility Relief Drivers begin work between 4:00 a.m. and 8:00 a.m., based on the particular job assignment which they are covering, with quitting times ranging from 1:00 to 2:00 p.m. or until completion of the particular assignment. Utility Relief Drivers ordinarily work Monday through Saturday. Utility

⁶ The Employer's documentary evidence indicates that Bulk Drivers work Monday through Saturday. Employer representative Meyer indicated that Bulk Drivers generally work Tuesday through Saturday. This discrepancy is not material to the outcome in this matter.

⁷ Many of the large format retailers have specifically timed delivery "windows" in which Bulk Drivers may deliver their product.

⁸ Unlike many of the other drivers in the petitioned-for unit, there is no evidence that the Bulk Drivers take sales orders, rotate beverages on store shelves, or place "point of sale" materials on the sales floor.

⁹ The Employer submitted that there were eight or ten Utility Relief Drivers at various places in the record, and asserted that there were eight Utility Relief Drivers in its post-hearing brief.

Relief Drivers primarily cover for or replace employees in positions requiring a commercial drivers license, such as the Conventional CRs, Full Service CRs, Fountain CRs and Bulk Drivers.¹⁰ When Conventional CRs, Full Service CRs, Fountain CRs or Bulk Drivers are unable to work, their job will generally be performed by a Utility Relief Driver. When not running relief routes, Utility Relief Drivers sometimes perform merchandising activities at large format stores. There is no evidence that the employees in the classifications which Petitioner seeks to exclude, such as Merchandisers, Reset Labor Employees, MEM employees or Lead Service Technicians, ever substitute for any of the product delivery drivers in the petitioned-for unit, as they are not skilled at performing the driving and delivery work.

Fleet Mechanics/Lead Fleet Mechanics

The Employer employs 2 Fleet Mechanics and 1 Lead Fleet Mechanic/foreperson, each of whom is paid on an hourly basis and does not receive commissions. Like the Warehouse Employees, the Fleet Mechanics are supervised by the Product Availability Manager (also known as the Warehouse Manager). The Fleet Mechanics and Lead Fleet Mechanic do not utilize handheld computers. The Fleet Mechanics generally begin work between 5:00 a.m. and 7:00 a.m., with a quitting time of 4:00 p.m., or begin work at 3:00 p.m., with a quitting time of 1:00 a.m. Fleet Mechanics ordinarily work Monday through Friday. The Fleet Mechanics provide routine maintenance and repair of the various types of trucks and vehicles utilized by the Employer.

¹⁰ Unlike Conventional CRs and Bulk Drivers whose job descriptions are contained in the record, the documentary evidence does not conclusively establish that Fountain CRs and Full Service CRs also are required to possess commercial drivers' licenses. The testimony of Regional Sales Manager Marla Meyer, however, suggests the existence of such a requirement as to Fountain CRs and Full Service CRs as well. (Tr. 116-117).

Warehouse Employees/Lead Warehouse Employee

The Employer employs approximately fifteen Warehouse Employees and one Lead Warehouse Employee. The Warehouse Employees are sometimes referred to as loaders and also include forklift operators. Three to five of the 15 Warehouse Employees work part-time rather than full-time. They are paid an hourly wage and receive no commission. The Warehouse Employees are supervised by the Product Availability Manager (also known as the Warehouse Manager). The Warehouse Employees do not utilize handheld computers. Day Warehouse Employees begin work between 3:00 a.m. and 7:00 a.m. with a quitting time of 3:00 p.m., and work Monday through Saturday. Night Warehouse Employees begin work at 3:00 p.m. with a quitting time of 1:00 a.m., and work Monday through Friday. Much of the warehouse/loading work is done at night when the drivers are not at the warehouse, so that the drivers' trucks will be loaded for the next day.

Disputed Classifications:

The Employer maintains that the following classifications of employees must be included in any appropriate unit. The Petitioner opposes the inclusion of these classifications in the bargaining unit.

Merchandisers

The Employer employs between 50 and 60 Merchandisers, approximately half of which work full-time and half of which work part-time.¹¹ Merchandisers are responsible for product merchandising within large volume stores including freshness rotation, display set up and maintenance, cooler stocking/rotation, storage room organization and movement of product from storage to the sales floor after initially delivery to storage by the bulk driver. Sales

¹¹ If an employee works more than 32 hours per week on average, he/she is considered full time.

responsibilities and customer contact are incidental and not a significant part of the Merchandiser position.

Merchandisers are paid on an hourly basis, and receive no commission. Merchandisers report to a Merchandising Manager, who reports to the Sales and Delivery (S&D) Operations Manager. The Merchandisers work primarily out of their homes, traveling from their homes directly to bulk customers without visiting the Employer's Modesto facility. Unlike all employee classifications but one, the Merchandisers are the only employees who are required to have their own personal vehicles for usage on the job.¹² They are paid a flat mileage reimbursement rate to compensate them for using their own vehicles. They are not required to, and generally do not possess, commercial drivers licenses. The Employer provides the Merchandisers with Nextel phones for their usage. Unlike the driver classifications who report to the Modesto facility on a daily basis to receive their assignments, the Merchandisers do not report to the facility on a daily basis and instead visit the facility to pick up assignments, paperwork or paychecks approximately once a week. Merchandisers, like the petitioned-for employees, spend the better part of their workday at the premises of customers, merchandising product.

Full-time Merchandisers generally begin work between 4:00 a.m. and 6:00 a.m., with a range of quitting times from 12:00 p.m. to 3:00 p.m. Full-time Merchandisers can work on any day, from Sunday to Saturday. Part-time Merchandisers generally begin work between 4:00 and 6:00 a.m., with a range of quitting times from 12:00 p.m. to 3:00 p.m., or begin work between 2:00 p.m. and 4:00 p.m., with a range of quitting times from 7:00 p.m. to 8:00 p.m. Part-time

¹² The Pre-Sale/Pre-Sell Representatives are also required to utilize their personal vehicles, but all parties have stipulated to their exclusion from any unit found appropriate herein.

Merchandisers can work on any day, from Sunday to Saturday. Merchandisers generally work no more than eight-hour shifts and are not encouraged to work overtime.

Reset Labor Employees

The Employer employs three Reset Labor Employees, who are hourly paid, and receive no commission. Reset Labor Employees are sometimes referred to as Space Management Employees. The Reset Labor Employees visit customers and favorably re-position the shelf, cooler and/or gondola space occupied by Employer beverages. Their work is essentially like that of Merchandisers, but who are involved in more special merchandising projects such as store openings, closings, or remodelings, the acquisition of additional retail space, or a particular promotion. When setting up products and shelves, the Reset Labor Employees ensure the products meet the Employer's merchandising standards for brand flow and that they are faced appropriately. The Reset Labor Employees report to the Utility Manager, who reports to the S&D Operations Manager. Reset Labor Employees generally begin work at 6:00 a.m. and finish work at 3:00 p.m., working Monday through Friday.

Marketing Equipment Management (MEM) Employees

The Employer employs twelve or thirteen Marketing Equipment Management (MEM) employees, who are paid on an hourly basis and receive no commissions. The MEM employees report to a Marketing Equipment Supervisor. The MEM classification includes Service Technicians, Fountain Installers, Vendor Installer and VISI Installer employees,¹³ Shop Technicians, and any Lead Service Technician.¹⁴ In essence, the MEM employees move, install, and service beverage cooling units (coolers). The MEM service technicians generally begin

¹³ The term "VISI" apparently refers to glass front, see-through coolers in which the product is easily visible.

¹⁴ The evidence was mixed as to whether the Lead Service Technician position is strictly part of the MEM department. In any event, the parties agreed at the hearing that the Lead Service Technicians should not be treated any differently from the regular Service Technicians or other employees who comprise the MEM department. (Tr. 146).

work at 7:00 a.m. and quit work at 5:00 p.m. (unless on call), and work Monday through Friday (unless on call). The MEM fountain or vending installer employees and MEM Shop Technicians also generally begin work at 7:00 a.m. and quit work at 5:00 p.m., and work Monday through Friday. A more particularized discussion of each of the MEM positions follows.

Service Technicians/Lead Service Technicians

The Employer employs Service Technicians, who utilize handheld computers to receive assignments as to which machines or equipment need repair.¹⁵ Such Service Technicians generally do not interact with other employees in the course of performing their work. The Service Technicians are responsible for repairing coolers, vending machines, fountain machines or other equipment in need of repair “in the trade,” i.e., not at the Employer’s facility but at a customer’s facility in the field. The Employer employs one Lead Service Technician who is paid hourly and receives no commissions. As noted above, the parties agreed at the hearing that the Lead Service Technicians should be treated and classified in the same manner as the other classifications that comprise the MEM category.¹⁶

Fountain Installer

Fountain Installers are responsible for the installation and retrieval of fountain equipment from restaurants, grocery and convenience stores. The Fountain Installer does not generally deliver beverages for the Employer. However, the Fountain Installer coordinates the delivery of

¹⁵ However, these handheld computers are connected to a different system than that of the handheld computers utilized by Conventional CRs, Full Service CRs, Fountain CRs, Bulk Drivers, and Pre-Sale/Pre-Sell Representatives.

¹⁶ There was unexplained, conclusionary testimony that the Lead Service Technician performs essentially the same function as the Lead Warehouse Employee and Lead Fleet Mechanic, rather than a function similar to Service Technicians. (Tr. 35). In the absence of further evidence on the subject, I do not place great weight upon this conclusionary testimony. I note, however, that the agreed-upon inclusion of the Lead Warehouse Employee and Lead Fleet Mechanic would support the inclusion of the Lead Service Technician in the event that they indeed perform similar functions.

fountain product with the Fountain CRs. Like the other MEM positions, the Fountain Installers are paid hourly and are supervised by the Marketing Equipment Supervisor.

Vendor and VISI Installer

The Vendor and VISI Installers are responsible for installing VISI coolers and vending machines at new or existing customers of the Employer. VISI Installers coordinate with Conventional CRs by coordinating the delivery of coolers to accounts so that products can be put into the coolers upon their arrival at the customer's premises. The Vendor and VISI Installer subset of MEM employees drive flatbed trucks (also known as a "box" truck or "bobtail") used to deliver vending machines, refrigerators/coolers. There is no evidence of these employees ever actually delivering beverage products. Like the other MEM positions, the Vendor and VISI Installers are paid hourly and are supervised by the Marketing Equipment Supervisor.

Shop Technician

The Shop Technicians are responsible for the preparation and readiness of all of the Employer's beverage equipment, including coolers, fountain and vending machine equipment, prior to installation at the premises of customers. The Shop Technicians ascertain that the equipment is in proper working order and is otherwise ready to be installed. Like the other MEM positions, the Shop Technicians are paid hourly and are supervised by the Marketing Equipment Supervisor. The Shop Technicians perform their work at the Employer's Modesto facility rather than at the site of the customer.

ANALYSIS

Resolution of unit composition issues begins with an examination of the petitioned-for unit. Only if it is inappropriate will alternative units be found. Bartlett-Collins Company, 334 NLRB 484 (2001). In making a determination as to whether a petitioned for unit is appropriate,

the Board has held that Section 9(a) of the Act only requires that the unit sought by the petitioning union be an appropriate unit for purposes of collective bargaining. Nothing in the statute requires that the unit be the only appropriate unit or the most appropriate unit. See Morand Brothers Beverage Co., 91 NLRB 409, 418 (1950); National Cash Register Co., 166 NLRB 173, 174 (1967); Dezcon, Inc., 295 NLRB 109, 111 (1989) (the Board need only select an appropriate unit, not the most appropriate unit). In evaluating the appropriateness of a petitioned-for unit, the Board relies upon the community of interest standard. Overnite Transportation, 322 NLRB 723, 724 (1996). The Board considers several factors in determining community of interest among employees, such as method of pay; hours of work; benefits; common supervision; qualifications, training and skills; job functions; amount of time spent away from the plant situs; interaction and contact among employees; functional integration; and bargaining history. Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962); Ore-Ida Foods, 313 NLRB 1016 (1994). A union's desire is always a relevant, but not dispositive, consideration. E.H. Koester Bakery & Co., 136 NLRB 1006 (1962). A proposed unit based on arbitrary, heterogeneous, or artificial groupings of employees is inappropriate. Moore Business Forms, Inc., 204 NLRB 552, 553 (1973); Brand Precision Services, 313 NLRB 657, 658 (1994). Similarly, the Board does not approve fractional units, i.e., combinations of employees that are too narrow in scope or that have no rational basis. Seaboard Marine, Ltd., 327 NLRB 556 (1999); Colorado National Bank of Denver, 204 NLRB 243 (1973). Units combining drivers and warehousemen have been held to be appropriate. See, e.g., Big Buck Lumber, 241 NLRB 639, 640 n. 2 (1979). The Board has also made clear that drivers may be included in more comprehensive, industrial-type units when they share a sufficient community of interest.

Tallahassee Coca-Cola Bottling Co., Inc., 168 NLRB 1037 (1967), enf'd, 409 F.2d 201 (5th Cir. 1969); E.H. Koester Bakery, *supra*, 136 NLRB at 1011-1013.

Where a petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, and may even select an appropriate unit that is different from the alternative proposals of the parties. Boeing Co., 337 NLRB 152, 153 (2001); Overnite Transportation, 331 NLRB 662, 663 (2000).

APPLICATION OF COMMUNITY OF INTEREST FACTORS

In applying a community of interest test, the Board analyzes bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. See J.C. Penney Company, 328 NLRB 766 (1999); and Armco, Inc., 271 NLRB 350, 351 (1984). No one of the above factors has controlling weight and there are no *per se* rules to include or exclude any classification of employees in any unit. Airco, Inc., 273 NLRB 348 (1984).

Method of Pay/Similarity in Wages

All employees receive their paychecks on the same date. Seven of the nine classifications the Petitioner seeks to include are paid on an hourly basis, with the only exceptions being the Conventional CRs and Fountain CRs who receive a base salary and commissions. All additional classifications which the Employer seeks to have included (Merchandisers, Reset Labor Employees, MEM employees and Lead Service Technicians) are also paid on an hourly basis, with none receiving commissions. There is no evidence in the record as to the wage rates of any classifications other than Bulk Drivers (who make \$16-18 per hour), part-time Merchandisers (who begin at an entry rate of between \$9.25 and \$9.50 per

hour), and full-time Merchandisers (who begin at an entry rate of approximately \$10.80 per hour). The Conventional CRs generally receive more money per hour than do Merchandisers, but the record does not specify by how much. The only employees who potentially earn less than part-time Merchandisers are part-time Warehouse Employees, though again the record does not support this assertion in any detail. Given the absence of any evidence as to the salary ranges of Full Service CRs, Utility Relief Drivers, Reset Labor Employees, Fleet Mechanics, Lead Fleet Mechanics, full-time Warehouse Employees, Lead Warehouse Employees, MEM employees, and Lead Service Technicians, the record is inadequate to support the conclusion of a community of interest within Petitioner's proposed unit on this ground.

Hours of Work

Other than the part-time Merchandisers, night Warehouse Employees, and certain Fleet Mechanics, it appears that all classifications in dispute begin work at some point between 3:00 and 8:00 a.m., and finish work at some point between 12:00 and 5:00 p.m. While the five-hour range of start and end times is relatively broad, I find that most employees work similar schedules and hours and that this factor therefore supports the Employer's position that only a unit including the additional classifications would be appropriate. The hours of the employees in the petitioned-for unit are not distinct from those of the employees the Petitioner would exclude. While most employees work Monday through Friday, there is evidence that Merchandisers work on weekends. However, I do not find that the fact that the Merchandisers work weekends detracts from my finding that the Merchandisers share a community of interest with the Petitioner's requested unit. See J.C. Penney Company, Inc., 328 NLRB 766, 768 (1999) (finding telemarketers who worked 7 days per week must be included in unit largely composed of Monday-Friday employees working 5 days per week).

The Conventional CRs are not eligible to receive overtime, the Fountain CRs (unlike all other classifications) receive “variable rate overtime”, and all remaining classifications (both those sought by Petitioner and those additional classifications sought by the Employer) working on an hourly basis receive traditional overtime.¹⁷ Thus, eligibility for overtime in no way differentiates the employees in the petitioned-for unit from the larger group of employees the Employer additionally seeks to include.

Benefits

Provided that they qualify as full time by virtue of working 32 or more hours per week on average, all employees, both those in Petitioner’s proposed unit and those additional classifications sought by the Employer, are eligible to receive and receive the same fringe benefits. See J.C. Penney Company, supra, 328 NLRB at 766 (requiring inclusion of telemarketers in unit of catalog employees where telemarketers share benefits with other unit employees so long as averaging 25 or more hours of work per week). While Petitioner argues that the Merchandiser position that it does not seek to represent is filled by many part-time employees, this is no less true of the included Warehouse Employees who it does seek to represent, many of who are also part-time. Therefore, I find that the employees in the petitioned-for unit do not possess any community of interest as to fringe benefits that is in any respect distinct from the community of interest shared with the larger group of employees sought by the Employer.

Common Supervision

As noted above, the Conventional CRs and Full Service CRs report to a Territory Sales Manager. The Utility Relief Drivers report to a Territory Coordinator, who also reports to the

¹⁷ The record does not indicate whether such employees receive time and a half, double time or some other variation on their usual hourly rate.

Territory Sales Manager. The Fountain CRs and Bulk Drivers report to a Sales and Delivery Operations Manager. The Merchandisers report to a Merchandising Manager, who also reports to the Sales and Delivery Manager. The Reset Labor Employees report to a Utility Manager, who also reports to the Sales and Delivery Operations Manager. The Fleet Mechanics, Lead Fleet Mechanics, Warehouse Employees, and Lead Warehouse Employees report to the Product Availability Manager. Finally, the MEM employees, including the Shop Technicians, Service Technicians, Fountain Installers, Vendor or VISI Installers, and Lead Service Technicians, report to the Marketing Equipment Supervisor. Importantly, all four of the supervisors mentioned above (Territory Sales Manager, Sales and Delivery Operations Manager, Product Availability Manager, and Marketing Equipment Supervisor) report to Regional Sales Manager Marla Meyer.

It is undisputed that all of the employees in this case work under the supervision of the Regional Sales Manager, and are supported by the same human resources professional. The Regional Sales Manager is either the second or third level supervisor of all positions at issue in this case. Petitioner seeks to include two of the classifications that report to the Sales and Delivery Operations Manager (Fountain CRs and Bulk Drivers), yet seeks to exclude two other classifications which report to the Sales and Delivery Operations Manager (Merchandisers and Reset Labor Employees). Petitioner's purported distinction cannot be supported by arguing that the Merchandisers and Reset Labor Employees have intermediate supervisors while the Fountain CRs and Bulk Drivers do not, since this reasoning should also exclude the Utility Relief Drivers, who the parties agree should be included in any appropriate unit but who have the intermediate Territory Coordinator supervisor between themselves and the higher level Territory Sales Manager.¹⁸ Thus, given the existence of common upper level supervision combined with the

¹⁸ Even if I did not rely upon common upper level supervision among employees stipulated to be included and those sought to be excluded, and even if I were to rely upon a lack of common immediate supervision as between the

inability to rationally differentiate on the basis of immediate first level supervision between the classifications the Petitioner would include or exclude, I find that the common supervision factor favors the Employer's position that the Merchandisers, Reset Labor Employees and MEM employees must be included in any appropriate unit. See also Seaboard Marine, Ltd., 327 NLRB 556 (1999) (rejecting union's request for unit comprised of three classifications without inclusion of twelve additional classifications sought by employer, where differing immediate supervision overcome by companywide wage levels, fringe benefits, work and safety rules, and personnel policies).

Qualifications, Training and Skills

As noted previously, a pre-employment physical capability evaluation may be required of persons seeking to be Conventional CRs or Merchandisers, but there is no evidence in the record as to whether such evaluations are routinely conducted or as to whether they are required of any of the other classifications sought to be included or excluded in this case.

Conventional CRs, Bulk Drivers and Utility Relief Drivers are required to have commercial drivers licenses, and the evidence suggests that Fountain CRs and Full Service CRs are subject to the same requirement. Merchandisers are required to have valid drivers licenses, but not commercial drivers licenses.¹⁹

included and excluded employees, it would not alter the outcome. See Texas Empire Pipe Line Co., 88 NLRB 631 n.2 (1950) (difference in supervision not per se basis for excluding employees from appropriate unit); Hotel Services Group, Inc., 328 NLRB 116 (1999). See also Huckleberry Youth Programs, 326 NLRB 1272, 1274 (1998) (peer health educators properly included in unit under community of interest analysis despite lack of common immediate supervision with unit members and despite not being afforded benefits available to full-time employees). Accord: Transerv Systems, Inc., 311 NLRB 766 (1993).

¹⁹ The record does not indicate whether warehouse personnel, MEM employees, Fleet Mechanics, or Reset Labor Employees are required to have driver's licenses, whether commercial or otherwise. It may be assumed that those employees who as part of their duties must drive to customers' facilities (e.g., Reset Labor Employees, MEM Vendor and VISI Installers, MEM Fountain Installers, MEM Service Technicians) are required to possess drivers licenses.

While Service and Shop Technicians generally repair beverage-dispensing equipment while Fleet Mechanics repair vehicles, there has been no showing that the difference in the nature of the items repaired entails any difference in the skills and qualifications possessed by the technicians and mechanics respectively.

The Merchandisers, Reset Labor Employees and MEM Service Technicians who Petitioner does not seek to represent must possess the interpersonal skills necessary to interact with representatives of the Company's customers, just as must the Conventional CRs, Fountain CRs and Utility Relief Drivers who Petitioner does seek to represent. Conversely, the agreed-upon included Warehouse Employees and Fleet Mechanics generally do not interact with the Employer's customers.

Job Functions

Employees inside and outside the petitioned-for unit also share many job functions and skills. For example, the VISI and Vendor Installers drive large company trucks, as do the Conventional CRs, Full Service CRs, Fountain CRs, and Bulk Drivers. The Merchandisers, Reset Labor Employees and MEM Service Technicians engage in the same sort of interactions with representatives of the Company's customers as do the Conventional CRs, Fountain CRs and Utility Relief Drivers. The Reset Labor Employees perform the same merchandising functions as the Conventional CRs, Utility Relief Drivers and Merchandisers. The MEM Service Technicians and Lead Service Technician utilize handheld computers, as do the Conventional CRs, Fountain CRs, Full Service CRs, and Bulk Drivers. Like the included Conventional CRs, the Merchandisers also have established routes they service.

The Petitioner relies upon Home Depot USA, Inc., 331 NLRB 1289 (2000) in support of its position that the petitioned-for unit is a traditional, noncontroversial drivers unit. While

Home Depot concededly involved a traditional drivers unit, the Petitioner's desire in the instant matter to further include warehouse personnel and mechanics in the unit precludes reliance upon Home Depot. I also note that the Board in that case based its conclusion that the drivers in Home Depot possessed a distinct community of interest in part upon factors which either do not apply or were not adequately demonstrated here, such as the unique uniforms worn by the drivers, and the medical examinations and drug testing required of drivers but not of other employees. 331 NLRB at 1289.²⁰

Amount of Time Spent Away from Plant Situs

The Warehouse Employees the Petitioner would include and the MEM Shop Technicians it would exclude from its unit spend the majority of their time at the Employer's Modesto facility. The Conventional CRs, Full Service CRs, Fountain CRs, Utility Relief Drivers, Bulk Drivers, who Petitioner would include, as well as the Reset Labor Employees, Merchandisers, MEM Vendor and VISI Installers and MEM Fountain Installers who it would exclude, spend the majority of their time away from the Employer's facility and at the premises of its customers. The Fleet Mechanics who the Petitioner would include, and the MEM Service Technicians and Lead Service Technician who it would exclude, split their time between repairs which can or must be made at the Modesto facility and repairs which can or must be made in the field, although most of technicians' work is in the field. Therefore, while it cannot be said that all employees have a common work situs, it is evident that there is no substantial difference between the work situses of the employees in the petitioned-for unit and the work situses of the employees the Employer contends must be added to the unit.

²⁰ Petitioner's attempted reliance upon Rockford Coca-Cola Bottling Co., 81 NLRB 579 (1949) is similarly unavailing. In Rockford Coca-Cola, the Board found a unit of route salesmen, excluding refrigeration maintenance employees and mechanics, to be appropriate. Here, by contrast, Petitioner seeks to include in its route salesmen unit not only mechanics but warehouse employees as well.

Interaction and Contact Among Employees

There are several examples in the record of situations in which employees in different classifications come into contact with one another. For example, the Fountain CRs who the Petitioner would include must coordinate with the MEM Fountain Installer employees the Petitioner would exclude in order to arrange for the placement of fountain beverage supplies in fountain machinery immediately upon its installation. Similarly, the MEM Vendor or VISI installers, who the Petitioner would exclude, are responsible for the delivery, installation and pickup of vending machines and coolers at customers serviced by the Full Service CRs, Conventional CRs and Bulk Drivers the Petitioner would include. Such MEM employees sometimes coordinate with Merchandisers or Full Service CRs to ensure that product is placed immediately after MEM equipment is installed. In the event of a reset in a small format store, there is generally contact between the Reset Labor Employees and the Conventional CRs who regularly service the small format customers. Further, the Conventional CRs obtain their point of sale material from a section of the back operations building where the MEM employees also work.

To some extent, the ability to transmit information via Nextel radios/phones, an (800) number, and handheld computers appears to lessen the need for face-to-face contact between various groups of employees, most particularly repair personnel.²¹ The Petitioner also points out the relatively limited interaction between Bulk Drivers and other employee classifications.

²¹ For example, it appears that if a Fountain CR, Full Service CR or Merchandiser were to notice some defect or problem with a cooler, fountain machine or vending machine while performing their duties, they would ordinarily call the (800) repair number or their supervisor, and a Service Technician would then receive a call or a notification on a handheld computer dispatching him/her to the location to correct the problem, without ever having spoken with or encountered the Fountain CR, Full Service CR or Merchandiser who originally called in the problem. As another illustration, there is not always face to face interaction between the Bulk Drivers and the other two classifications which service “big box” bulk accounts, i.e., Merchandisers and Pre-Sale/Pre-Sell Representatives, given the ability to communicate by other means and given that such employees are generally at the customer’s premises at different times from each other.

Nevertheless, I find that the extent of interaction between employees (with the exception of Bulk Drivers) set forth above, in light of the degree of functional integration discussed below, as well as the interaction between both proposed included and excluded classifications with representatives of the Employer's customers, all support the conclusion that the petitioned-for unit is not an appropriate unit in the absence of the additional classifications which the Employer seeks to include.

Interchange

While the Board attaches less weight to permanent transfers than temporary transfers,²² the record nevertheless reflects a substantial amount of permanent transfers among not only the classifications that the Petitioner seeks to include but also those additional classifications which the Employer would include. For example, there appear to be many employees with a typical career track of part-time Merchandiser, full-time Merchandiser, Utility Relief Driver, and then either Full Service CR or Conventional CR. Similarly, there are several examples of employees who started out as Merchandisers who subsequently became both Conventional CRs and Fountain CRs, or Full Service CRs and Bulk Drivers. Conversely, there are examples of employees who began as Warehouse Employees and subsequently became Merchandisers.²³ In short, there is abundant evidence of permanent transfers between the merchandising department and other departments. See J.C. Penney, *supra*, 328 NLRB at 767 (including telemarketers in catalog employee unit where employees routinely transferred between departments including in and out of telemarketing). Accord: United States Steel Corporation, 192 NLRB 58, 59-60

²² See Red Lobster, 300 NLRB 908, 911 (1990); Lipman's, a Division of Dayton-Hudson Corporation, 227 NLRB 1436, 1438 (1977).

²³ The record also reflects examples of employees who were Merchandisers, explored other positions in other departments, and ultimately settled upon remaining as Merchandisers.

(1971). But see Bartlett-Collins Company, 334 NLRB 484, 485 (2001) (finding diminished significance to transfers occurring over a period of years).²⁴

More importantly, there is also evidence in the record of temporary interchange. For example, when all drivers are present and working, the Utility Relief Drivers are sometimes assigned to perform merchandising duties comparable to those performed by part-time and full-time Merchandisers. Similarly, there was evidence of emergency situations in which Merchandisers have had to deliver product directly from the Modesto facility to a customer's location in the manner that it would ordinarily be performed by one of the CR drivers.²⁵

Functional Integration

There is a substantial degree of functional integration in this case. All of the employees in positions which the Employer seeks to include in the unit work towards the common goal of making Pepsi products available in the Modesto area. They are either working towards the goal of delivering, selling and merchandising products that end up on a store's shelves (Conventional CR, Bulk Driver, Merchandiser, Utility Relief Driver, Reset Labor Employee, Warehouse Employee, Lead Warehouse Employee, Fleet Mechanic, Lead Fleet Mechanic) or they are working towards the goal of delivering, selling and merchandising products that are provided through vending machines, fountain machines, and coolers (Full Service CR, Fountain CR, Utility Relief Driver, MEM VISI Installer, MEM Fountain Installer, MEM Service Technician, MEM Shop Technician, Lead Service Technician). Those employees who do not actually deliver product to customers either stock vehicles with product (Warehouse Employees), repair

²⁴ The Board routinely gives less weight to voluntary interchange driven by the convenience or personal needs of employees rather than the operational demands of the employer. See New Britain Transportation Co., 330 NLRB 397, 398 (1999); D&L Transportation, 324 NLRB 160, 162 n. 7 (1997); Red Lobster, 300 NLRB 908, 911 (1990). In this case, the record does not establish whether the permanent transfers reflected in the Employer's records introduced at hearing were driven by employer needs, employee desires, or some combination thereof.

²⁵ Petitioner admits in its post-hearing brief that there is no evidence of interchange between the Warehouse Employees and the remaining employees.

vehicles (Fleet Mechanics), repair equipment (Service Technicians, Shop Technicians), or display product (Merchandisers), all of which facilitate the delivery and sale of product by those assigned to do so.

Other Terms and Conditions of Employment

The MEM VISI and Vendor Installers, MEM Fountain Installers, and MEM Service Technicians, like the Conventional CRs, Full Service CRs, Fountain CRs and Bulk Drivers, all drive company vehicles outside the facility in the performance of their duties and spend the majority of their workday away from the Modesto facility. All employees are allowed to bid on posted job openings and are eligible for the CR training program. All full time employees working out of the Modesto facility receive the same fringe benefits, are subject to the same employee handbook policies and employee trainings and orientations, have the same vacation policy, wear similar uniforms, and attend the same Employer social functions. All employees working out of the Modesto facility serve or are eligible to serve on various workplace committees, such as the Accident Review Board, Safety Empowerment Team, and Employee Insight Action Committee, and are eligible to receive the same safety, attendance and/or employee referral bonuses. There is also evidence that suggests the existence of a single time clock in the back operations building, utilized not only by employees primarily assigned to that building but employees assigned to other buildings as well (e.g., MEM Shop Technicians).²⁶

Bargaining History

The parties stipulated at hearing that there was no prior bargaining history as to the Employer's Modesto facility. However, the parties stipulated that since the late 1980's or early

²⁶ Given the frequency with which Conventional CRs, Full Service CRs, Bulk Drivers, Utility Relief Drivers, Fountain CRs, Merchandisers, and Reset Labor Employees are "in the trade" away from the facility, I do not find it significant that all employees share the same restroom and breakroom at such times as they are present at the Modesto facility.

1990's, there have not been any bargaining units established at the Employer's facilities in California which included driver classifications but excluded Merchandisers.

Taking all of these factors into account, I find that the petitioned-for unit is arbitrary in its inclusion of certain employee classifications and its exclusion of other classifications, and therefore is inappropriate. I start from the proposition that there is an obvious community of interest among the various driver classifications such as Conventional CRs, Full Service CRs, Utility Relief Drivers, Fountain CRs and Bulk Drivers. See Carpenter Trucking, 266 NLRB 907 (1983) (noting appropriateness of including local drivers in same unit despite different types and sizes of trucks operated by different drivers); Transerv Systems, Inc., 311 NLRB 766, 767 (including bike messengers in same unit with car messengers, citing Carpenter Trucking). The Board has acknowledged that truck drivers often have a "dual community of interest" with certain factors supporting their inclusion in the same unit as other plant employees and certain factors favoring their representation in a separate unit. See Pacemaker Mobile Homes, 194 NLRB 742, 743 (1971); Home Depot USA, Inc., 331 NLRB 1289, 1290 (2000). However, logical inconsistencies arise as the Petitioner seeks to move beyond the fundamental drivers unit in this case. Specifically, the Employer correctly asserts that the Fleet Mechanics and Warehouse Employees who Petitioner seeks to include in the unit, have far less in common with the drivers who make up the core of the unit than do the Merchandisers, Reset Labor Employees, and MEM installation employees that the Petitioner would exclude from the unit. Fleet Mechanics and Warehouse Employees do not work at customer sites, do not merchandise, and do not interact with customers. Conversely, Merchandisers and Reset Labor Employees, like Conventional CRs, Fountain CRs, or Utility Relief Drivers, work at customer sites, merchandise, and interact with customers. The Merchandisers assigned to a big box large account perform

many of the same functions there that Conventional CRs perform at the premises of smaller accounts. There is also evidence that Reset Labor Employees work at customer sites, merchandise, and interact with customers, albeit less frequently or less routinely, given the focus of Reset Labor Employees on operations which are opening, closing or remodeling.²⁷

Along the same lines, I cannot ascertain any principled basis on which to distinguish the Fleet Mechanics that the Petitioner seeks to include in its unit from the Service and Shop Technicians that it would exclude. There has been no showing of any difference in qualifications, skills or training between those employees who repair trucks and those who repair coolers, fountain machines and vending machines. See Seaboard Marine, Ltd., 327 NLRB 556 (1999) (finding nothing distinct about clerical and inspection skills of proposed included trailer interchange clerks, vehicle and equipment receiving clerks, and equipment control clerks in relation to skills of proposed excluded dispatch employees, boarding agents, inbound coordinators, claims clerks, parts/purchasing clerks and stevedore coordinators).²⁸

The Employer submitted with its post-hearing brief a copy of a Decision and Direction of Election dated April 11, 2003 in The Pepsi Bottling Group, Inc., 28-RC-6152, and argued, among other things, that said decision supports the conclusion that the Merchandisers share an overwhelming community of interest with the Conventional CRs. While I have taken administrative notice of this decision, I note that the Employer failed to supply the April 17,

²⁷ While the Petitioner correctly asserts that the Reset Labor Employees should not really be characterized as primarily drivers or warehouse employees, this does not change the fact that they assist, and conduct their work at locations serviced by, the Conventional CRs, Utility Relief Drivers, Bulk Drivers, and Merchandisers.

²⁸ While the Fleet Mechanics and Lead Fleet Mechanics work in a building separate from all other classifications, this would suggest their separateness not merely from MEM shop technicians but from all classifications, including those in the Petitioner's requested unit. I note the existence of recent Board cases finding it inappropriate to combine drivers and mechanics in the same unit. See Novato Disposal Services, Inc., 330 NLRB 632, 633 (2000); Overnite Transportation Co., 322 NLRB 347, 349-350 (1996). However, the parties have apparently agreed to the appropriateness of including the Fleet Mechanics and Lead Fleet Mechanics in the unit with the driver classifications, subject, of course, to the Employer's contention that the additional Merchandiser, Reset Labor Employee and MEM classifications must also be included.

2003 Supplemental Decision and Direction of Election in the same case, in which the Regional Director of Region 28 modified or reversed certain findings made in his earlier decision as supplied by the Employer. In my view, the Supplemental Decision largely bases its exclusion of MEM employees on the alleged absence of a community of interest between the MEM employees and the driver classifications such as Conventional CR, Full Service CR, Fountain CR, Bulk Driver, and Utility Relief Driver. I do not read the Supplemental Decision as supportive of the Employer's argument that MEM employees must be included when Fleet Mechanics and Warehouse Employees are included because MEM employees "have at least as much community of interest with the drivers as the Warehouse Employees and Fleet Mechanics do." In any event, in my view the Region 28 decision is inapposite here insofar as it supports neither the petitioned-for unit nor the Employer's larger unit but rather a unit which would include the drivers and Merchandisers but would exclude all warehouse employees, mechanics and technicians.²⁹

Taking all of the above factors into account, I find that the Petitioner has failed to establish that the petitioned-for unit shares any community of interest that is sufficiently distinct from the community of interest shared among other employees at the Employer's Modesto facility who it does not seek to represent. Other than minor differences such as the Merchandisers' use of personal rather than company vehicles and the lack of day-to-day contact between Merchandisers and other employees, I find that the overwhelming majority of community of interest factors establish that the Employer's proposed unit is the minimally

²⁹ I agree with the Employer's assertion that the Decision and Direction of Election dated September 15, 2003 in The Pepsi Bottling Group, Inc., 31-RC-20660, of which I also take administrative notice, is not directly pertinent in this case. In that case, the primary issue was the possible inclusion of sales personnel working primarily in the field in a production, maintenance, quality control and warehouse unit comprised almost entirely of employees working exclusively at the facility and not in the field. By contrast, the parties agree that an appropriate unit in this case would include employees who work both at the Employer's facility and in the field.

appropriate unit in this case. See also Dr. Pepper Bottling Co. of Fort Worth, Texas, 228 NLRB 1119, 1120 (1977) (requiring the inclusion of merchandisers in an appropriate unit of driver-salesmen).

CONCLUSIONS

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I conclude that:

Upon the entire record in this proceeding, including the parties' arguments made at the hearing and the briefs filed by the Employer and the Petitioner, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is a Delaware corporation with a facility and principal office located in Modesto, California, where it is engaged in the manufacture and distribution of soft drink products. During the past 12 months, the Employer purchased and received at its Modesto, California facility goods and materials valued in excess of \$50,000 directly from businesses located outside the State of California. In such circumstances, I find the assertion of jurisdiction appropriate herein.
3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
4. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time conventional customer representatives, full service customer representatives, fountain customer representatives, bulk drivers, utility relief drivers, fleet mechanics, lead fleet mechanics/forepersons, warehouse employees, lead warehouse employees, merchandisers, reset labor employees, marketing equipment management employees, and lead service technicians employed by the Employer at the Employer's 200 West River Road, Modesto, California facility; excluding pre-sale/pre-sell representatives, checkers, professional employees, clerical employees, all other employees, guards, and supervisors as defined by the Act.

There are in excess of approximately 140 employees in the unit.³⁰

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by TEAMSTERS UNION LOCAL 386, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees

³⁰ As the number of employees in the unit found appropriate herein is larger than the unit requested by the Petitioner (140 employees compared to 70 employees), the Petitioner is accorded a period of 14 calendar days from the date of this Decision and Direction of Election in which to submit to the undersigned an additional showing of interest. In the event the Petitioner does not wish to proceed with an election, it may withdraw its petition without prejudice by notice to the undersigned, within 7 days from the date of this Decision and Direction of Election. If the Petitioner subsequently and timely submits the necessary showing of interest, the National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate.

engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). The undersigned shall make the list available to the Petitioner

when the undersigned shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **September 30, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (510) 637-3315. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **October 7, 2004**. The request may **not** be filed by facsimile.

Dated: September 23, 2004

/s/

Alan B. Reichard, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

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